Supreme Court, U.S.
FILED

001355 FEB 26 2001

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No. _____

In The

Supreme Court of the United States

RICHARD GANULIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD GANULIN
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Appearing *pro se*

QUESTION PRESENTED

Can the United States Congress constitutionally make a facially sectarian law that establishes Christmas Day-December 25, a day of Christian celebration, as a national legal public holiday?

LIST OF PARTIES

Petitioner: Richard Ganulin

Respondent: United States of America

Intervenors-Respondents: Jeffrey Niemer, Patty Hemsath, Anne Dolan

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Richard Ganulin, respectfully prays that a writ of certiorari be issued to review the final judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Ohio-Western Division dismissing the Petitioner's Amended Complaint for failure to state a claim upon which relief can be granted was issued on December 6, 1999. A copy of the opinion is attached. App. 3; 71 F.Supp.2d 824. The opinion of the United States Court of Appeals for the Sixth Circuit summarily affirming the District Court's dismissal was issued on December 19, 2000, and was unreported as Appeal No. 00-3051. A copy of the opinion is attached. App. 1.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 to review the decision of the United States Court of Appeals for the Sixth Circuit entered on December 19, 2000.

STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 6103 (Holidays) provides as follows:

(a) The following are legal public holidays:

New Year's Day, January 1.

Birthday of Martin Luther King, Jr., the third Monday in January.

Washington's Birthday, the third Monday in February.

Memorial Day, the last Monday in May.

Independence Day, July 4.

Labor Day, the first Monday in September.

Columbus Day, the second Monday in October.

Veterans Day, November 11.

Thanksgiving Day, the fourth Thursday in November.

Christmas Day, December 25.

STATEMENT OF THE CASE

All Christian children in this nation grow up learning that they are preferred by their government. All non-Christian children grow up learning that they are not. That is a lesson taught by the federal government's statutory establishment and subsidy of Christmas Day-December 25, a Christian celebration, as a national legal public holiday.

Petitioner Richard Ganulin is a non-Christian citizen of the United States, one of 40 million non-Christians in

this nation. Mr. Ganulin does not embrace the Christian beliefs, ceremonies, and rituals represented by Christmas Day and personified by Christians in the stories of the birth of Jesus Christ, their Messiah, and the annual arrival of Santa Claus, derived from the Christian Saint Nicholas. He does not teach these Christian beliefs, ceremonies, and rituals to his children.

In the latter half of the 1800s, the United States Congress first established the holy and cultural Christian Christmas Day-December 25 celebration as a national legal public holiday. Christmas Day is the only national legal public holiday that is sectarian. That facially sectarian law made by Congress institutionalizes a powerful and permanent ideological and financial subsidy for Christians. The law is now codified at 5 U.S.C. § 6103.

5 U.S.C. § 6103, therefore, unfairly interferes with Mr. Ganulin's natural and equal freedom of belief, makes it more difficult for him to live in a way consistent with his beliefs, obstructs his ability to teach his children and makes it less likely they will understand and respect his beliefs, induces him and his children to be Christian, negates his essential identity, imposes outsider political status, and directly leads to the unlawful expenditure of taxpayer funds by providing a specific government imposed paid holiday for federal employees on a day of Christian celebration. The injuries to Mr. Ganulin and his children are concrete, particularized, and imminent. The injuries will continue unless abated. Even if there is any doubt, the Supreme Court has held that "on a motion to dismiss we presume that the general allegations embrace those specific facts that are necessary to support the

claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Mr. Ganulin filed an Amended Complaint on November 25, 1998, to achieve the dignity of equality under the law, to stop the injuries caused by his own government's statutory preference for Christmas Day, and to form a more perfect union in the United States. Mr. Ganulin's Amended Complaint alleges that 5 U.S.C. § 6103, insofar as the statute establishes Christmas Day as a national legal public holiday, violates the Establishment Clause of the First Amendment to the United States Constitution ("Congress shall make no law respecting an establishment of religion. . . . ") and also violates Mr. Ganulin's constitutional rights to freedom of association and equal protection.

The District Court granted the motions to dismiss filed by the United States and by the intervening Christian federal employees. Disparagingly and insufficiently concluding that "We are all better for Santa," the District Court ruled that as a matter of law Mr. Ganulin "cannot support his claims that the establishment of Christmas Day as a legal public holiday violates the Establishment Clause or his rights to freedom of association and equal protection under the United States Constitution."

The District Court opinion demonstrated its fundamental misunderstanding both of constitutional law and the Christmas Day celebration by admonishing Mr. Ganulin to be content that he "is never jailed" for not celebrating Christmas Day. The District Court refused to apply strict scrutiny to any of Mr. Ganulin's constitutional claims. Rather, the District Court erroneously

applied its own version of the more lax *Lemon* test to the Establishment Clause claim and erroneously applied lax rational basis review to the equal protection claim. The District Court applied no judicial review to the freedom of association claim concluding instead that Mr. Ganulin's First Amendment association rights were not implicated at all by his claim that the statutory establishment of Christmas Day as a national legal public holiday was unconstitutional. The decision of the District Court is attached at App. 3; 71 F.Supp.2d 824.

The United States Court of Appeals for the Sixth Circuit summarily affirmed the dismissal by the District Court. The Court of Appeals reiterated that Mr. Ganulin "could not establish that the statute was unconstitutional." At oral argument, the Chief Judge of the Sixth Circuit suggested that Mr. Ganulin should just ignore the federal holiday. The opinion of the Court of Appeals is attached at App. 1.

REASONS FOR GRANTING THE WRIT

I. THE STATUTORY ESTABLISHMENT BY CONGRESS OF A HOLY AND CULTURAL CHRISTIAN CELBRATION AS A NATIONAL LEGAL PUBLIC HOLIDAY VIOLATES THE ESTABLISHMENT CLAUSE

The federal government's facially sectarian statutory establishment and subsidy of Christmas Day as a national legal public holiday indoctrinates, defines by reference to one sect's theological and cultural beliefs and practices,

and creates an express symbolic union between the government and Christianity. The use of the nation's laws and taxpayer funds to establish and support Christmas Day, an expressly Christian celebration, as a national legal public holiday is unfair and unconstitutional official government preference for a particular sect.

Each national legal public holiday has a communicative purpose and effect that educates the citizenry and creates an identity for the government. Just as the federal government endorses and communicates honor for its servicemen by its establishment of Veterans Day as a national legal public holiday, honor for workers by its establishment of Labor Day, honor for the birth of the nation by its establishment of Independence Day, honor for the first president by its establishment of George Washington's Birthday, honor for a great civil rights leader by its establishment of Martin Luther King's Birthday, and so on for each of the government's national legal public holidays, so the government endorses and communicates honor for the Christian symbols of Jesus Christ and Santa Claus by its establishment of Christmas Day as a national legal public holiday. The government's establishment of the birthday of George Washington is not constitutionally the same as the government's establishment of the birthday of Jesus Christ.

Christmas Day is the consummate Christian celebration by name, origin, sectarian dictate, and modern practice. Christmas is Christes Maesse, the Mass of Christ, established by the Church in the fourth century. Christmas Day remains a time when modern sectarian authorities and national, state, and local media preach essential Christian messages. Christmas is "silent night,

holy night" for Christians when "heaven and nature sing" to proclaim "joy to the world" and adoration for "Christ the Lord." Christmas Day is a time of Christian celebration honoring Jesus Christ and revering Santa Claus. Christmas Day symbolizes and preserves a Christian religious and cultural identity for existing and future adherents of Christianity.

Indisputably, Christmas Day is a Christian celebration. The Supreme Court stated that "Christmas, we note perhaps needlessly, is the holiday when Christians celebrate the birth of Jesus of Nazareth, whom they believe to be the Messiah." *County of Allegheny v. ACLU*, 492 U.S. 573, 579, 106 L.Ed.2d 472, 109 S.Ct. 3086 (1989). The United States admitted in its appellate brief that "Christmas is a Christian holiday." The intervenors have candidly asserted throughout the proceeding that they consider Christmas Day "a Holy Day and attend services on Christmas Day" and that the government preference in 5 U.S.C. § 6103 facilitates their religious needs (motion to dismiss and appellate brief). The Christian Coalition filed an *amicus* brief in the District Court also admitting that "[p]eople of the Christian faith consider December 25th a holy day on which to celebrate the birth of Jesus Christ."

Christmas Day, therefore, should be a personal celebration under the law embraced as a matter of individual choice and conscience, and must not be established by the government as a national legal public holiday. The Establishment Clause of the First Amendment to the Constitution secures the most fundamental and sacred principle upon which the United States was founded, the principle that the government must remain neutral on matters of

sectarian belief. No right is more precious to an individual. In matters of sectarian belief, the individual does not yield to the sovereign.

The United States Supreme Court guards against governmental sectarian preferences. The Court emphasized that "[w]e sponsor an attitude on the part of government that shows no partiality to any one group. . . . " *Zorach v. Clauson*, 343 U.S. 306, 313, 96 L.Ed. 954, 72 S.Ct. 679 (1952). The Supreme Court reaffirmed that "[w]e make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary." *Id*. The Court proclaimed: "There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. . . . [T]he separation should be complete and unequivocal. . . . The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute." *Id*., 343 U.S. at 312.

The District Court so completely misapprehended *Zorach* that three times it quoted the identical inapposite passage from *Zorach*, intending by the quotes to validate the sectarian-based establishment of Christmas Day as a national legal public holiday. App. 20, 25, 31-32. In fact, *Zorach* clearly and expressly opposed public sectarianism. *Zorach* drew a bright line between facially neutral acts of the government that applied equally to all religions, that involved no public expenditure, and that were invoked purely as a matter of personal choice and without government influence, and highly disfavored facially sectarian government acts using public funds such as the establishment of Christmas Day as a national legal public holiday.

The District Court's decision mistook the difference between facially neutral legislative acts and facially sectarian legislative acts, the difference between generic theism and sectarianism, and the difference between dicta and dictate. The District Court suggested that it could only "dimly perceive" the law. App. 16. The District Court erroneously believed that government coercion is an element of an Establishment Clause claim. The District Court variously and erroneously suggested that Christmas Day is not particularly Christian, that even if Christmas Day were Christian its establishment as a national legal public holiday does not prefer Christianity, and that even if the federal statute did prefer Christianity Congress was entitled to establish that preference. The District Court's confusion caused it to apply the wrong level of judicial scrutiny to the Petitioner's Amended Complaint.

The District Court injudiciously stated that Mr. Ganulin experienced "seasonal confusion," that he "is never jailed" for not celebrating Christmas Day, that he is "better" because of Christmas Day, that he should just ignore the law made by Congress establishing Christmas Day as a national legal public holiday, and that the relatively lax judicial test applicable to facially neutral legislative acts incidentally benefitting all religions governs judicial review of the facially sectarian statutory establishment of Christmas Day as a national legal public holiday. App. 3-4.

This judicial unwillingness to fairly confront a major and serious constitutional defect in the nation's laws forever perpetuates the government's unlawful preference for Christians. The law and facts are clear, not dim:

Christmas Day is a holy and cultural Christian celebration; the establishment of a holy and cultural Christian celebration as a national legal public holiday is a government preference for Christians under the law; and the United States Constitution condemns that government sectarian preference.

Establishment Clause jurisprudence requires strict judicial scrutiny of government acts that create a sectarian preference on their face or as applied. *Larson v. Valente*, 456 U.S. 228, 246, 72 L.Ed.2d 33, 102 S.Ct. 1673 (1982); *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 695, 104 L.Ed.2d 766, 109 S.Ct. 2136 (1989); *County of Allegheny v. ACLU*, 492 U.S. 573, 608-09, 106 L.Ed.2d 472, 109 S.Ct. 3086 (1989). The Supreme Court held: "[W]e have expressly required 'strict scrutiny' of practices suggesting a denominational preference. . . . " *Id.* By contrast, the District Court erroneously and self-fulfillingly held that "[t]he Court's conclusion that § 6103 does not promote a sectarian preference forecloses Ganulin's argument that this Court should be applying this strict scrutiny test to determine the constitutionality of § 6103." App. 24, ft. 3.

The District Court's tragic error, summarily affirmed by the Court of Appeals, flies in the face of the inspiring ideal of equality of belief under the law nurtured by the Supreme Court:

> [T]he Constitution mandates that the government remains secular, rather than affiliate itself with religious beliefs or institutions, precisely in order to avoid discriminating among its citizens on the basis of their religious faiths. . . . A secular state, it must be remembered, is not the

> same as an atheistic or anti-religious state. A secular state establishes neither atheism nor religion as its official creed.

County of Allegheny v. ACLU, 492 U.S. 573, 610, 106 L.Ed.2d 472, 109 S.Ct. 3086 (1989). The Supreme Court described the inspired meaning of the Establishment Clause:

> Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to the 'infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism'. . . . It is settled law that no government official in this Nation may violate these fundamental constitutional rights regarding matters of conscience. . . . The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another.

Id., 492 U.S. at pp. 590-91.

The Supreme Court further emphasized that: "The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.' " *Id.*, p. 593-94. Moreover, the government is disabled from sending "a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that

they are insiders, favored members of the political community." *Id.*, p. 595. The Supreme Court was emphatic that government preference is forbidden:

> Whatever else the Establishment Clause may mean (and we have held it to mean no official preference for religion over nonreligion . . .), it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions). . . .

Id., p. 605. These preeminent ideas are repeated throughout the Supreme Court's Establishment Clause decisions.

The majority does not rule in matters of sectarian and cultural belief. "While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us." *Lee v. Weisman*, 505 U.S. 577, 596, 120 L.Ed.2d 467, 112 S.Ct. 2649 (1992). "When the government puts its *imprimatur* on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs." *Id.*, 505 U.S. at 607. Just as the Free Speech Clause of the First Amendment necessarily limits government viewpoint preferences, *Board of Regents v. Southworth, et al.*, 529 U.S. 217, 146 L.Ed.2d 193, 120 S.Ct. 1346 (2000) (the Supreme Court ruled that government viewpoint neutrality is the proper measure for, and the principal protection of, individual speech rights), so the Establishment Clause of the First Amendment necessarily limits government sectarian preference. Government neutrality is the proper measure for, and the principal protection of, individual belief rights.

There has never been a legitimate doctrinal review of the facially sectarian law made by Congress establishing Christmas Day as a national legal public holiday. Reviewers either fallaciously fabricate that Christmas Day is not a Christian celebration, that the establishment by Congress of a national legal public holiday is not an act with significant communicative and financial significance, or that the United States Constitution authorizes a preference for Christian beliefs and practices. In reality, the principled application of the Establishment Clause to 5 U.S.C. § 6103 leads to the conclusion that the District Court and the Court of Appeals erred by concluding that the Amended Complaint failed to state a claim upon which relief can be granted.

Constitutional law clearly delineates bright lines between actions and expression of individuals and actions and expression of the government. *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 132 L.Ed.2d 650, 115 S.Ct. 2440 (1995); *Santa Fe Independent School District v. Doe, et al.*, 530 U.S. 290, 147 L.Ed.2d 295, 120 S.Ct. 2266 (2000); *Boy Scouts of America et al. v. Dale*, 530 U.S. 640, 147 L.Ed.2d 554, 120 S.Ct. 2446 (2000); *Mitchell, et al. v. Helms, et al*, 530 U.S. 793, 147 L.Ed.2d. 660, 120 S.Ct. 2530 (2000). Individuals may choose to prefer Christianity. The federal government may not. 5 U.S.C. § 6103 includes a sectarian choice made by the federal government.

The indignity of inequality under the law is painful and injurious to individuals and shaming and shameful for a society. Unfortunately, many individuals have been conditioned to accept the statutory preference for Christianity established by Congress, just as they accepted the

words of the invocation at the inauguration of President George W. Bush ("We pray this in the name of the father, and of the son, the Lord Jesus Christ, and of the Holy Spirit") and the words of the benediction at the inauguration ("We respectfully submit this humble prayer in the name that's above all other names, Jesus the Christ. Let all who agree say, 'Amen'."). Millions of other individuals, however, repeatedly suffer the serious injuries caused by the statutory inequality created by 5 U.S.C. § 6103. Christmas Day and Christianity are integral to the lives of millions of American citizens. Yet Christmas Day and Christianity are antipathetic to the lives of millions of other American citizens.

Tolerated is not the same as equal under the law. Non-Christians are entitled to be equal under the law 365 days per year. Christian and non-Christian citizens both benefit from eliminating the government preference for Christmas Day and Christianity. All American citizens will have the opportunity to live in a more equal and just nation. Christians will further benefit as their holy and cultural celebration is sanctified by the removal of government *imprimatur*.

For these reasons, 5 U.S.C. § 6103 is unconstitutional insofar as the statute establishes Christmas Day as a national legal public holiday. The Petitioner's Amended Complaint states a claim upon which relief can be granted and should not have been dismissed.

II. THE STATUTORY ESTABLISHMENT BY CONGRESS OF A HOLY AND CULTURAL CHRISTIAN CELEBRATION AS A NATIONAL LEGAL PUBLIC HOLIDAY VIOLATES PETITIONER'S RIGHT TO FREEDOM OF ASSOCIATION

An individual's freedom of association is a fundamental constitutional right. The Supreme Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. . . . The [f]reedom of association therefore plainly presupposes a freedom not to associate." *Roberts v. United States Jaycees*, 468 U.S. 609, 622, 623, 82 L.Ed.2d 462, 104 S.Ct. 3244 (1984). The Supreme Court has acknowledged that individual choice about the upbringing of children is among the associational rights of basic importance in our society and is sheltered by the Constitution against the government's disregard or disrespect. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996).

The Supreme Court described the natural and equal right to beliefs:

> At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.

Planned Parenthood of Southeastern Pennslyvania v. Casey, 505 U.S. 833, 851, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

The holy and cultural Christian symbolism represented by the Christmas Day celebrations conflicts with non-Christians' concept of existence, meaning, the universe, and the mystery of human life. These are highly personal, not governmental, concerns. The federal law establishing Christmas Day as a national legal public holiday interferes with Mr. Ganulin's association right to not be Christian and his association right to control the upbringing of his children without his own government's expression of sectarian preference.

The District Court held, to the contrary, that Mr. Ganulin does not have an association right to be free of the federal government's statutory preference for Christian beliefs and practices. App. 29. The District Court merely asserted: "The Court simply does not believe that declaring Christmas to be a legal public holiday impermissibly imposes Christian beliefs on non-adherents in a way that violates the right to freedom of association." App. 30. The Court did not apply strict scrutiny to the claim that the establishment of Christmas Day as a national legal public holiday violated Mr. Ganulin's constitutional right to freedom of association. Rather, the Court denigrated the burden placed upon non-Christians to affirmatively disregard the government preference for Christian beliefs and practices and suggested that non-Christians be content with the knowledge that "one is never jailed" for not celebrating Christmas Day. The spectacular United States Constitution and the magnificent right to freedom of association demand more from the federal judiciary than summary dilution of essential freedoms.

The Petitioner's Amended Complaint states a claim upon which relief can be granted and should not have been dismissed.

III. THE STATUTORY ESTABLISHMENT BY CONGRESS OF A HOLY AND CULTURAL CHRISTIAN CELEBRATION AS A NATIONAL LEGAL PUBLIC HOLIDAY VIOLATES PETITIONER'S RIGHT TO EQUAL PROTECTION OF THE LAW

The statutory establishment of Christmas Day as a national legal public holiday affects non-Christians, a suspect minority class, and burdens their rights of belief and association, fundamental rights under the Constitution. A law that either affects a suspect class or burdens a fundamental right can be upheld only if the law is necessary to further a compelling governmental interest and if the law is the least restrictive means of achieving that compelling governmental interest.

5 U.S.C. § 6103, insofar as it establishes Christmas Day as a national legal public holiday, ideologically excludes the suspect class of non-Christians, burdens non-Christians' fundamental freedoms of belief and association, and directly leads to taxpayer financial subsidy of the Christian celebrations. The District Court erroneously applied lax rational basis review to the challenged statute and erroneously and irrelevantly concluded that "[t]he United States . . . has a rational, secular reason for the establishment of the holiday." App. 32.

The Petitioner's Amended Complaint states a claim upon which relief can be granted and should not have been dismissed.

IV. ESTABLISHING CHRISTMAS DAY AS A NATIONAL LEGAL PUBLIC HOLIDAY IS NOT A LAWFUL ACCOMMODATION OF CHRISTIANITY

Accommodation is a principle created by the Supreme Court to allow the government to make a sectarian-based exception to an otherwise generally applicable secular burden in order to protect an individual's right to free exercise of religion. Accommodation acknowledges the sectarian basis for the government action. It is a very narrow exception to the Establishment Clause that is inapplicable to sustaining 5 U.S.C. § 6103.

In *County of Allegheny v. ACLU, supra,* the Supreme Court explained what an accommodation is:

> [A]n accommodation of religion, in order to be permitted under the Establishment Clause, must lift 'an identifiable burden on the exercise of religion'. . . . Prohibiting the display of the creche at this location [inside a county courthouse], it bears repeating, does not impose a burden on the practice of Christianity (except to the extent that some Christian sect seeks to be an officially approved religion), and therefore permitting the display is not an 'accommodation' of religion in the conventional sense.

492 U.S. at 613, ft. 59.

Enjoining Congress from declaring Christmas Day a national legal public holiday does not impose a burden on the practice of Christianity except to the extent that some Christians seek to be an officially approved religion. Treating Christians the same as non-Christians

under the law is not an identifiable burden. Pretextual "accommodating" of the majority sect in the nation with government ideological and financial support is "establishment" by another name.

Zorach v. Clauson, supra, clearly and expressly opposed public sectarianism. The government action in *Zorach v. Clauson* was sectarian-neutral, applied equally to all religions, involved no public funds, and was invoked only as a personal choice. By contrast, Christmas Day is an obviously Christian celebration and its statutory establishment as a national legal public holiday is a government imposition that unlawfully uses public funds. The District Court wildly erred by relying upon *Zorach* and holding, contrary to its earlier holding that § 6103 does not promote a sectarian preference, that "[t]he fact that § 6103 may accommodate Christians who wish to engage in religious celebrations of Jesus Christ's birth does not mean that the holiday has an impermissible religious effect."

CONCLUSION

The United States can and must achieve the ideal of absolute equality of belief under the law. Many people are insensitive to the injustice and injury imposed upon non-Christian citizens of the United States by the federal government's establishment of Christmas Day as a national legal public holiday. Insofar as 5 U.S.C. § 6103 establishes Christmas Day as a national legal public holiday the statute is a powerful and permanent ideological and financial subsidy for Christian beliefs and practices.

Personal belief systems and related celebrations are thankfully allowed to flourish in this nation as a matter of individual choice and conscience. The federal government's legitimate role is to remain totally neutral, to preserve the purity of individual freedoms, and to protect equality under the law for all sectarian and cultural beliefs and practices.

It is disingenuous to claim that Christmas Day is not a Christian celebration, false to assert that the federal government's statutory establishment of Christmas Day as a national legal public holiday is not a preference for Christianity, and shaming and shameful to all citizens, Christian and non-Christian, to propose that the Constitution of the United States condones a governmental preference for Christianity and Christians. 5 U.S.C. § 6103 violates the Establishment Clause of the First Amendment and violates the Petitioner's constitutional rights to freedom of association and equal protection of the law.

A Writ of Certiorari should be granted in this case so that the Court may take jurisdiction to determine whether the Petitioner's challenge to the federal government's establishment of Christmas Day as a national legal public holiday states a claim upon which relief can be granted.

Respectfully submitted,

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NOT RECOMMENDED FOR PUBLICATION

No. 00-3051

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD GANULIN,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee,

and JEFFREY NEIMER, PATTY HEMSATH, ANNE DOLAN,

Intervenors-Appellees.

_____/

On Appeal from the United States District Court for the Southern District of Ohio

(Filed Dec. 19, 2000)

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be *prominently* displayed if this decision is reproduced.

Before: MARTIN, Chief Judge, GUY, and COLE, Circuit Judges.

PER CURIAM. Plaintiff, Richard Ganulin, appeals from the district court's dismissal of his claims challenging the constitutionality of the statute making Christmas

Day, December 25, a legal public holiday. *See* 5 U.S.C. § 6103. The Amended Complaint alleged that the statute violated the Establishment Clause of the First Amendment and deprived him of his rights to equal protection and freedom of association. Defendant, the United States of America, and the intervening federal employees filed motions to dismiss under Fed. R. Civ. P. 12(b)(6) and 12(c). The district court granted the motions to dismiss, finding that plaintiff could not establish that the statute was unconstitutional. *See Ganulin v. United States*, 71 F. Supp.2d 824 (S.D. Ohio 1999). After careful consideration of the issues presented on appeal and having had the benefit of oral argument, we **AFFIRM** the dismissal for the reasons set forth in the district court's opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RICHARD GANULIN,	:	
Plaintiff,	:	
	:	**Case No. C-1-98-557**
v.	:	
UNITED STATES OF AMERICA,	:	
	:	**District Judge Susan J. Dlott**
Defendant,	:	
and	:	
JEFFREY NIEMER, et al.	:	**ORDER GRANTING MOTIONS TO DISMISS**
Defendant-Intervenors.	:	

THE COURT WILL ADDRESS PLAINTIFF'S SEASONAL CONFUSION ERRONEOUSLY BELIEVING CHRISTMAS *MERELY A RELIGIOUS INTRUSION.*

WHATEVER THE REASON CONSTITUTIONAL OR OTHER CHRISTMAS *IS NOT* AN ACT OF BIG BROTHER!

CHRISTMAS IS ABOUT JOY AND GIVING AND SHARING IT IS ABOUT THE CHILD WITHIN US IT IS MOSTLY ABOUT CARING!

ONE IS NEVER JAILED FOR NOT HAVING A TREE FOR NOT GOING TO CHURCH FOR NOT SPREADING GLEE!

THE COURT WILL UPHOLD SEEMINGLY CONTRADICTORY CAUSES DECREEING *"THE ESTABLISHMENT"* AND *"SANTA"* **BOTH W O R T H W H I L E** ***"CLAUS(es)!"***

WE ARE ALL BETTER FOR SANTA THE EASTER BUNNY TOO AND MAYBE THE GREAT PUMPKIN TO NAME JUST A FEW!

THE COURT HAVING READ THE LESSONS OF "LYNCH"[1] ***REFUSES*** TO PLAY THE ROLE OF THE GRINCH![2]

AN EXTRA DAY OFF IS HARDLY HIGH TREASON IT MAY BE SPENT AS YOU WISH *REGARDLESS* OF REASON.

THERE IS ROOM IN THIS COUNTRY AND IN ALL OUR HEARTS TOO FOR DIFFERENT CONVICTIONS AND A DAY OFF TOO!

This matter is before the Court on the Defendant United States' Motion to Dismiss (doc. #21) and Defendant-Intervenors Jeff Neimer's, Anne Dolan's, and Patty Hemsath's Motion to Dismiss (doc. #22), pursuant to Rule 12 of the Federal Rules of Civil Procedure. The Defendant and Defendant-Intervenors seek dismissal of Plaintiff Ganulin's Amended Complaint, which challenges the constitutionality of 5 U.S.C. § 6103. Section 6103 declares Christmas Day to be a legal public holiday. Plaintiff Ganulin has filed briefs opposing dismissal and the Christian Coalition has filed an amicus curiae brief in favor of dismissal. The Court has carefully considered all the filings and the relevant case law. Upon consideration of the law, the Motions to Dismiss are hereby **GRANTED**.

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[1] *Lynch v. Donnelly*, 465 U.S. 668 (1984).

[2] Dr. Seuss, *How the Grinch Stole Christmas.*

I. PROCEDURAL BACKGROUND

Plaintiff Ganulin filed a Complaint against the United States of America on August 4, 1998 alleging that the statute making Christmas Day a legal public holiday violated the Establishment Clause of the First Amendment to the United States Constitution ("the Establishment Clause"). Jeffrey Niemer, Patty Hemsath, and Anne Dolan moved to intervene pursuant to Rule 24(a) of the Federal Rules of Civil Procedure on November 2, 1998 and were granted status as defendant-intervenors on November 6, 1998. Defendant-Intervenors are federal employees seeking to protect their interest in the employment benefit of a Christmas holiday.

Plaintiff filed an Amended Complaint on November 25, 1998 claiming that a legal public holiday on Christmas Day pursuant to 5 U.S.C. § 6103 violates the Establishment Clause and interferes with his rights to equal protection and freedom of association protected by the United States Constitution. Defendant and Defendant-Intervenors then filed their Motions to Dismiss and the Christian Coalition filed an amicus curiae brief. They argue that Plaintiff lacks standing to bring this action and that he has failed to state a claim upon which relief can be granted.

II. LEGAL STANDARD FOR MOTIONS TO DISMISS

The purpose of a motion to dismiss or a motion for judgment on the pleadings is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if all facts and allegations in the complaint are true. *See Mayer v. Mylod*, 988 F.2d 635, 638 (6th

Cir. 1993). For purposes of dismissal under Rules 12(b)(6) or 12(c), the complaint must be construed in the light most favorable to the nonmoving party and its allegations taken as true. *See Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995). To survive a motion for judgment on the pleadings, "a . . . complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988) (citations and internal quotations marks omitted); *accord Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995). The test for dismissal, however, is a stringent one. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1189 (6th Cir. 1996).

Consequently, a complaint will not be dismissed pursuant to a motion for judgment on the pleadings unless there is no law to support the claims made, the facts alleged are insufficient to state a claim, or there is an unsurmountable bar on the face of the complaint. Because a motion for judgment on the pleadings is directed solely to the complaint, the focus is on whether the plaintiff is entitled to offer evidence to support the claims, rather than on whether the plaintiff will ultimately prevail. *See Roth v. Steel Prods.*, 705 F.2d 134, 155 (6th Cir. 1983); *Haffey v. Taft*, 803 F. Supp. 121, 127 (S.D. Ohio 1992).

III. ANALYSIS

A. Standing

Defendant and Defendant-Intervenors both move for dismissal on the grounds that Ganulin lacks standing to pursue these claims in federal court. A review of the basic precepts of standing and the special precepts for standing in Establishment Clause cases and taxpayer cases is in order before discussing the arguments of the parties.

The jurisdiction of the federal courts is limited by Art. III of the Constitution to "Cases" and "Controversies." Inherent in the case-or-controversy limitation are two concerns. First, "those words limit the business of the federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). Second, "those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to other branches of government." *Id.* The dual limitation imposed by the case-or-controversy requirement is often referred to as justiciability. *See id.*

The concept of standing is one aspect of justiciability. *See id.* at 98. At an irreducible minimum, the Constitution requires that the party invoking jurisdiction bear the burden of proving the following three elements: First, the plaintiff must have suffered an injury in fact-an actual injury which is concrete and particularized. Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be fairly traceable to the challenged action of the defendant. Third, it

must be likely, and not merely speculative, that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Briggs v. Ohio Elec. Comm'n*, 61 F.3d 487, 491 (6th Cir. 1995).

On a motion to dismiss "general factual allegations of an injury resulting from the defendant's conduct may suffice [because] we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.' " *Lujan*, 504 U.S. at 561 (quoting *Lujan v. National Wildlife Fed.*, 497 U.S. 871, 889 (1990)).

1. Standing in First Amendment and Establishment Clause Cases

There are special concerns in First Amendment and Establishment Clause cases regarding standing. Plaintiffs bringing claims pursuant to the Establishment Clause or other First Amendment rights must meet all three aspects of the *Lujan* test to establish standing. However, the Sixth Circuit has noted that First Amendment plaintiffs do not bear a heavy burden, *see Briggs*, 61 F.3d at 492, and the standing inquiry in Establishment Clause cases can be tailored to reflect the type of injury Establishment Clause plaintiffs are likely to suffer, *see Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997). Plaintiffs must allege more than an abstract injury, but actual injury to individual values of an abstract or esoteric nature can provide the basis for standing. *See id.* In conducting its standing inquiry, the courts must be careful not to find standing for a plaintiff on the assumption that no one will be found to have standing if the plaintiff at bar lacks standing. *See Valley Forge Christian College v. Americans United*

for the Separation of Church and State, 454 U.S. 464, 489 (1982). The federal courts are not always the proper vehicle for seeking to correct constitutional wrongs. *See id.*

The Supreme Court has "consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizens's interest in the proper application of the Constitution and the laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large" lacks standing. *Lujan*, 504 U.S. at 573-74. For example, a plaintiff would not have standing if his or her sole complaint was that a government act or policy violated the Constitution. *See Valley Forge*, 454 U.S. at 485. The respondents in *Valley Forge* sought the district court to declare unconstitutional a decision of the Department of Health, Education, and Welfare to convey a tract of land to the Valley Forge Christian College. *See id.* at 468. The Supreme Court noted that while the respondents were clearly committed to the principle of church and state separation, they lacked standing because they failed "to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485-86.

Conversely, a plaintiff objecting to a state sponsored display of religious symbols has standing because his or her injury is caused by unwelcome, personal and direct contact with the religious display. *See Suhre*, 131 F.3d at 1086. "[D]irect contact with an unwelcome religious exercise or display works a personal injury distinct from and in addition to each citizen's general grievance against

unconstitutional government contact." *Id.* at 1086. Similarly, the Sixth Circuit held that a plaintiff alleging direct contact with a portrait of Jesus hanging in a public school had standing because "use of governmental authority to encourage a sectarian religious view is sufficient injury if directed towards the plaintiff." *Washegesic v. Bloomingdale Public Sch.*, 33 F.3d 679, 682 (6th Cir. 1994); *see also Granzeier v. Middleton*, 955 F. Supp. 741, 743 n.2 (E.D. Ky. 1997) (finding that plaintiff's repeated exposure to signs allegedly endorsing religion in the county courthouse and inability to conduct business in the courthouse on Good Friday was sufficient to confer standing) *aff'd* 173 F.3d 568 (6th Cir. 1999).

In another case, the Sixth Circuit held that residents of the Cleveland area had standing to object to the decision of the Cleveland Hopkins International Airport to lease space to a religious organization for use as a chapel. The court stated that even if the plaintiffs could "avoid the chapel area. . . . this impingement on their right to use the airport is sufficient to confer standing since it would 'force them to assume special burdens' to avoid 'unwelcome religious exercises.' " *Hawley v. City of Cleveland*, 773 F.2d 736, 740 (6th Cir. 1985) (quoting *Valley Forge*, 454 U.S. at 487 n.22).

2. Standing in Taxpayer Cases

Finally, and before turning to the specific allegations of standing raised by Ganulin, the Court must examine one more avenue of establishing standing: taxpayer standing. The Supreme Court first addressed the question of whether taxpayers had standing to object to federal

expenditures in *Frothingham v. Mellon*, 262 U.S. 447 (1923). The Court ruled that taxpayers had only a "comparatively minute and indeterminable" interest in treasury moneys and that the effect of government expenditures upon future taxation was too "remote, fluctuating, and uncertain" to confer standing on the federal taxpayer. *Id.* at 487. The Court modified *Frothingham* in *Flast*, holding that under certain circumstances taxpayers do have standing to challenge the constitutionality of government expenditures. The Court defined two requirements for taxpayer standing:

> First, the taxpayer must establish a logical link between [the status of federal taxpayers] and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, s 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between [the status of federal taxpayers] and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds the specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. 1, s 8.

Flast, 392 U.S. at 102-03. That is, for example, "taxpayers can sue to enjoin congressional appropriations . . . where

such appropriations violate a specific constitutional provision, such as the Establishment Clause." *Hawley*, 773 F.2d at 741. In *Flast*, taxpayers were found to have standing to challenge the expenditure of funds for the purchase of instructional materials to be used in parochial schools. *See* 392 U.S. at 103.

Flast does not confer general rights of standing to taxpayers challenging alleged Establishment Clause violations. The Court has subsequently held that taxpayers do not have standing under *Flast* to challenge legislation transferring government property to a religious organization if the conveyance was done under the authority of the Property Clause, Art. IV, § 3, cl. 2, and not under the taxing and spending clause of Art. I, § 8. *See Valley Forge*, 454 U.S. at 480. The *Flast* exception is a narrow one and only applies when an appropriation and not other governmental acts are at issue. *See Hawley*, 773 F.3d at 741.

3. Plaintiff Ganulin's Assertions of Standing

Ganulin asserts several bases for standing in his Amended Complaint:

> 24. 5 USC 6103 interferes with Plaintiff's natural and equal right of free beliefs and practices in matters of religion and culture.
>
> 25. 5 USC 6103 is, in effect, a form of imposed assimilation and association on non-Christians.
>
> 26. 5 USC 6103 makes it more difficult for Plaintiff to live in a way consistent with his

> beliefs and practices, makes it more difficult for him to effectively instruct his children about his beliefs and practices, and makes it less likely his children will understand and respect his beliefs and practices.
>
> 27. 5 USC 6103 makes Plaintiff feel like an outsider and not an integral part of the political community in the United States.
>
> 28. Plaintiff and his family, as residents in and citizens of the United States, are directly and personally exposed to the national legal public holiday of Christmas Day – December 25 and cannot avoid that exposure.
>
> 29. Plaintiff is a federal taxpayer. Plaintiff is also injured because federal tax funds are used pursuant to 5 USC 6103.

Amended Complaint.

The Court has reservations about finding that Ganulin has established standing and shares the concerns raised by the United States, the Defendant-Intervenors and the amicus curiae. First, Ganulin's assertions that 5 U.S.C. § 6103 makes him feel like a political outsider sound like claims of psychological harm. The Supreme Court has stated that psychological harm is not sufficient injury in fact to confer standing. *See Valley Forge*, 454 U.S. at 485.

Second, there is a question of whether the harms of which Ganulin complains are redressable. The Court believes that the majority of Americans, Christians and non-Christians alike, would likely continue to celebrate

the secular and religious aspects of Christmas on December 25 of each year whether or not Christmas Day is a legal public holiday. Jewish Americans celebrate Chanukah and children of many diverse religious backgrounds go trick-or-treating on Halloween even though these days are not legal public holidays. If Ganulin only seeks to gain a sense of personal satisfaction in seeing that the Constitution is upheld, then he lacks standing. *See Steel Co. v Citizens for a Better Environment*, 118 S.Ct. 1003, 1018-19 (1998) (stating that psychic satisfaction is not a sufficient Article III remedy to confer standing).

Third, Ganulin asserts federal taxpayer status without expressly stating in what way tax funds are unconstitutionally appropriated. In support of his taxpayer argument, Ganulin cites *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, a member of the Nebraska legislature opposed the state practice of funding a chaplain to open each legislative day with a prayer. *See id.* at 784-85. The Supreme Court held that the plaintiff legislator had standing as a member of a legislature and as a taxpayer whose taxes were used to fund the chaplaincy. *See id.* 463 U.S. at 786 n.4. The facts in this case are distinguishable from the seminal taxpayer cases, *Marsh* and *Flast*. Taxpayer funds were directly provided to religious entities in *Marsh* and in *Flast*. The practice of celebrating Christmas Day as a legal public holiday does not analogously allocate taxpayer funds to religious organizations. Any potential monetary benefit to religious organizations flowing from the holiday is indirect and remote.

These concerns alone, however, are not reason to find that Ganulin lacks standing. Ganulin likens his case to

Suhre and *Washegesic* where plaintiffs established standing based on their direct, personal contact with unwelcome religious symbols and displays. *See Suhre*, 131 F.3d at 1084 (display of the Ten Commandments in the county courthouse); *Washegesic*, 33 F.3d at 681 (display of a portrait of Christ in a public secondary school). Ganulin does not explicate further as to the nature of the contact to which he and his family are exposed. The Court presumes that the direct contact Ganulin experiences would be the closing of federal buildings and functions, such as the closing of the federal courts and the postal service, for reasons he asserts are religious in nature.

Although it is a close call, the Court cannot conclude that Ganulin could prove no set of facts in support of his assertion of standing. *See Conley*, 355 U.S at 45-46. Therefore, the Motion to Dismiss cannot be granted on the grounds that Ganulin lacks standing to bring his claims. The Court turns now to Ganulin's substantive claims and the arguments for dismissal regarding each claim.

B. Establishment Clause

Ganulin's primary claim is that the establishment of Christmas Day as a legal public holiday violates the Establishment Clause. The Establishment Clause of the First Amendment to the Constitution reads: "Congress shall make no law respecting an establishment of religion." The First Amendment was made binding upon the states by the Fourteenth Amendment. *See Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 757 (1995). The language of the Establishment Clause does not make obvious what conduct is prohibited. In *Everson v. Board of*

Education, 330 U.S. 1 (1947), the Supreme Court attempted to define the scope of the Establishment Clause:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

Id. at 16. Despite this attempt to define the scope, the Supreme Court admitted in 1971 that it still could "only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The same assessment could be made today.

The Sixth Circuit applies a modified version of the *Lemon* test when reviewing Establishment Clause challenges. *See Granzeier v. Middleton*, 173 F.3d 568, 573 (6th Cir. 1999). In *Lemon* the Supreme Court articulated a three part test for examining whether a statute violates the Establishment Clause:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an

> excessive government entanglement with religion.

403 U.S. at 612-13 (internal citations and quotations omitted). As the Sixth Circuit has noted, however, the Supreme Court has applied the "endorsement" test in more recent cases. *See Granzeier*, 173 F.3d at 572.

The Sixth Circuit considers the endorsement test to be a clarification of the effects prong of the *Lemon* test. *See id.* at 573. The principle of the endorsement test is that the "Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to religion relevant in any way to a person's standing in the political community.' " *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 594 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)). Whether a government act or statute impermissibly endorses religion is judged from the perspective of a reasonable observer. *See Granzeier*, 173 F.3d at 573. Views on both the Sixth Circuit and the Supreme Court are split as to whether the reasonable observer should be deemed to be aware of the history and context of the act or statute in question, *see Capitol Square*, 515 U.S. at 780 (O'Connor, J., concurring, joined by Souter and Breyer, JJ.); *Americans United for Separation of Church and State v. Grand Rapids*, 980 F.2d 1538, 1543-44 (6th Cir. 1992), or whether the reasonable observer should not be deemed to have any special knowledge, *see Capitol Square*, 515 U.S. at 800 n.5 (Stevens J., dissenting); *Grand Rapids*, 980 F.2d at 1557 (Lively J., dissenting).

1. First Prong – Secular Purpose

Ganulin makes two primary assertions concerning the religious nature of Christmas which the Court must accept as true for purposes of these Motions. *See Miller*, 50 F.3d at 377. First, he asserts that Christmas Day is the time when Christians celebrate the birth of Jesus Christ, the individual they believe to be their Messiah. *See* Amended Complaint ¶ 18. Second, he asserts that on Christmas Day Christians celebrate the arrival of the legendary Christian figure "Santa Claus." *See id.* ¶ 19. From these premises, Ganulin concludes that the declaration of Christmas as a legal public holiday necessarily has a religious, sectarian purpose of promoting Christianity. The Court need not reject Ganulin's premises to reach a different conclusion on the secular purpose prong of the *Lemon* test. The Court can accept the religious origins of the Christmas holiday and still conclude that the government is merely acknowledging the secular cultural aspects of Christmas by declaring Christmas to be a legal public holiday.

"A government practice need not be exclusively secular to survive the first part of the *Lemon* test; unless it seems to be a sham, the government's assertion of a secular purpose is entitled to deference." *Granzeier*, 173 F.3d at 574; *see also, Lynch*, 465 U.S. at 680 (stating that an act or statute will be struck down on the basis of the secular purpose prong only if it "was motivated wholly by religious considerations"). Courts have repeatedly recognized that the Christmas holiday has become largely secularized. Justice Blackmun stated in *County of Allegheny* that "both Christmas and Chanukah are part of the

same winter-holiday season, which has attained a secular status in our society." 492 U.S. at 616 (Blackmun, J.). This conclusion has been agreed with in both majority and dissenting opinions in the lower courts. *See e.g., Granzeier,* 173 F.3d at 580 (Moore, J., dissenting) (Christmas is "now secularized to a significant extent."); *Koenick v. Felton,* 973 F. Supp. 522, 525 (D. Md. 1997) (describing Christmas as a highly secularized holiday) *aff'd* 190 F.3d 259 (4th Cir. 1999).

The various opinions expressed by the Supreme Court justices in *Lynch* illustrate that even though the justices have very different beliefs about the constitutionality of some state activities held in association with Christmas, they have not questioned the constitutionality of the legal public holiday itself. In *Lynch,* the Supreme Court concluded that the city of Pawtucket, Rhode Island, could include a religious creche in its public Christmas display along with other secular figures without violating the Establishment Clause. *See* 465 U.S. at 687. In her concurrence, Justice O'Connor stated that Christmas "has very strong secular components and traditions." 465 U.S. at 692 (O'Connor, J., concurring). Even the dissenting justices, who objected to the inclusion of the creche, agreed that "the Christmas holiday in our national culture contains both secular and sectarian elements." *Id.* at 709 (Brennan, J., dissenting, joined by Marshall, Blackmun, and Stevens, JJ.).

The dissenting justices concluded that the Establishment Clause is not offended when justices do "no more than accommodate the calendar of public activities to the plain fact that many Americans will expect on that day to

spend time visiting with their families, attending religious services, and perhaps enjoying some respite from pre-holiday activities." *See id.* at 710 (Brennan, J., dissenting, joined by Marshall, Blackmun, and Stevens, JJ.). The Supreme Court reached similar conclusions in other cases. *See e.g., County of Allegheny,* 492 U.S. at 611-12 ("[C]onfining the government's own celebration of Christmas to the holiday's secular aspects . . . simply permits the government to acknowledge the holiday without expressing an allegiance to Christian beliefs . . . . "); *Zorach v. Clauson,* 343 U.S. 306, 313-14 (1952) ("When the state . . . cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.").

The conclusion that Christmas has a secular purpose is also supported by cases analyzing the constitutionality of school, office, and courthouse closings on other days traditionally celebrated as holy days by Christians. Four circuit courts have concluded that cities may close public functions on the Friday before Easter, which Christians celebrate as Good Friday, the day Jesus Christ was crucified. *See Koenick v. Felton,* 190 F.3d 259 (4th Cir. 1999) (creating a public school holiday from the Friday before Easter through the following Monday); *Bridenbaugh v. O'Bannon,* 185 F.3d 796 (7th Cir. 1999) (allowing Indiana state employees to have a day off with pay); *Granzeier,* 173 F.3d at 576 (closing of state and county offices and courts); *Cammack v. Waihee,* 932 F.2d 765 (9th Cir. 1991) (declaring Good Friday to be a legal holiday).

In these Good Friday decisions, the courts recognized the secularization of the Christmas holiday. *See Koenick,* 973 F. Supp. at 525 (describing Christmas as a highly

secularized holiday) *aff'd* 190 F.3d 259 (4th Cir. 1999); *cf. Granzeier*, 173 F.3d at 575 (stating that the Christmas holiday is established for the convenience of citizens and individual motivations may be a mix of secular and religious considerations). Circuit Judge Moore, in her dissent in *Granzeier*, implied that she would uphold the constitutionality of a public Christmas celebration by stating that Christmas is now secularized and easily distinguishable from Good Friday. *See* 173 F.3d at 580 (Moore, J., dissenting); *see also, Cammack*, 932 F.2d at 789 (Nelson J., dissenting).

Interestingly, the cases opposing public recognition of religious holidays do not dispute the constitutionality of the Christmas legal public holiday. "Some holidays that are religious, even sectarian, in origin, such as Christmas and Thanksgiving, have so far lost their religious connotation in the eyes of the general public . . . [that they] have only a trivial effect in promoting religion." *See Metzl v. Leininger*, 57 F.3d 618, 620 (7th Cir. 1995). The *Metzl* court held that a Good Friday school closing law was unconstitutional, but implied that its ruling might change if the state articulated a secular, rather than religious, reason for the closing. *See id.* at 623-24. Not surprisingly then, the Seventh Circuit upheld an Indiana law which gave state employees a paid holiday for Good Friday when the state presented evidence that the day off was recognized in order to create a holiday during a time period where there otherwise would be four months without a holiday. *See Bridenbaugh*, 185 F.3d at 799.

Similarly, the District of Columbia Circuit reversed and remanded a district court opinion dismissing a complaint which alleged that the closing of a public library on Easter violated the Establishment Clause. *See Bonham v. District of Columbia Library Admin.*, 989 F.2d 1242, 1245 (D.C. Cir. 1993). The *Bonham* court stated that the plaintiff should have a chance to prove that Easter had not "acquired the significant secular meaning and traditions" that Christmas has acquired. *See id.* at 1245. The appellate court chastised the district court for its categorical proposition that public buildings could be closed on all public holidays, but it did not question the validity of Christmas closings. *See id.*

2. Second Prong – Endorsement

The issue under the Sixth Circuit's modified version of the *Lemon* test effects prong is whether a reasonable observer would think that the federal government is endorsing religion by proclaiming Christmas Day to be a legal public holiday. *See Grand Rapids*, 980 F.2d at 1543-44. The Court must find that the government does not impermissibly endorse religion in general or Christianity in particular by recognizing Christmas Day. An examination of *Granzeier* is instructive. The court noted in *Granzeier* that many details of our calendar system have religious roots – for example, the names of days of the week come from Roman and Norsemen deities and the year is calculated by reference to events from the Christian religion – yet are not violative of the Establishment Clause. *See* 173 F.3d at 575. The court next mentioned in the same discussion that the Christmas holiday was established for the convenience of its citizens. *See id.* When the court then

concluded that Good Friday closings are not an endorsement of religion, this Court must conclude the same in reference to Christmas. "[S]o long as the finding can be made that there is a significant secular reason for closing [county government buildings] on any particular date, . . . the fact that the closing is also convenient for persons of a particular faith does not render the closing unconstitutional." *Id.* at 576.

Ganulin argues that the recognition of Christmas as a national public holiday pursuant to § 6103 has the primary effect of endorsing sectarian Christian beliefs. The Supreme Court's opinion in *County of Allegheny* implicitly rejects that argument when it explains why the government cannot celebrate Christmas as a religious holiday:

> Celebrating Christmas as a religious, as opposed to secular, holiday, necessarily entails professing, proclaiming, or believing that Jesus of Nazareth, born in a manger in Bethlehem, is the Christ, the Messiah. If the government celebrates Christmas as a religious holiday (for example, by issuing an official proclamation saying: "We rejoice in the glory of Christ's birth!"), it means that the government really is declaring Jesus to be the Messiah, a specifically Christian belief. In contrast, confining the government's own celebration of Christmas to the holiday's secular aspects does not favor the religious beliefs of non-Christians over that of Christians. Rather, it simply permits the government to acknowledge the holiday without expressing an allegiance to Christian beliefs, an allegiance that would truly favor Christians over non-Christians.

492 U.S. at 611-12. Similarly, the Supreme Court in *Lynch* stated that the inclusion of a nativity scene in a public Christmas display containing several other more secularized figurines had only an "indirect, remote, and incidental" benefit to "one faith or religion or to all religions." 465 U.S. at 683; *see also Koenick*, 190 F.3d at 267 (concluding that a school holiday on Good Friday does not include a facial denominational preference). It necessarily follows that the legal public holiday of Christmas does not have the primary effect of endorsing Christianity in particular or religion in general.[3]

By giving federal employees a paid vacation day on Christmas, the government is doing no more than recognizing the cultural significance of the holiday. *See County of Allegheny*, 492 U.S. at 601 ("The government may acknowledge Christmas as a cultural phenomenon. . . . "). The fact that § 6103 may accommodate Christians who wish to engage in religious celebrations of Jesus Christ's

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[3] Ganulin argues that the court should be applying a strict scrutiny analysis because § 6103 grants a sectarian preference to Christians over non-Christians and religion over nonreligion. In *Larson v. Valente*, 456 U.S. 228 (1982), the Supreme Court stated that where a statute clearly grants a denominational preference, it "must be invalidated unless it is justified by a compelling interest, and unless it is closely fitted to further that interest." *Id.* at 247 (internal citations omitted). The Court's conclusion that § 6103 does not promote a sectarian preference forecloses Ganulin's argument that this Court should be applying this strict scrutiny test to determine the constitutionality of § 6103. Further, if true, Ganulin's argument concerning Christmas applies with equal force to closing public buildings for Good Friday. The Sixth Circuit, however, applied the *Lemon* test, not strict scrutiny analysis, to the Good Friday issue in *Granzeier*. *See* 173 F.3d at 572-76.

birth does not mean that the holiday has an impermissible religious effect. The Supreme Court forcefully has stated "[w]hen the state . . . cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions." *Zorach*, 343 U.S. at 313-14; *cf. Marsh*, 463 U.S. at 812 (Brennan, J., dissenting, joined by Marshall, J.) (recognizing that government "may to some extent act to facilitate the opportunity of individuals to practice their religion," in an opinion opposing the right of a state legislature to open session with prayer). Moreover, Section 6103 is analogous to Sunday Closing Laws upheld in *McGowan v. Maryland*, 366 U.S. 420 (1961), in that both are recognized to have religious origins but not an impermissible religious effect. The Supreme Court's conclusion in *McGowan* has relevance in the case at bar: "To say that the States cannot prescribe Sunday as a day of rest for these [secular] purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State." 366 U.S. at 445.

3. Third Prong – Entanglement

The Supreme Court has stated that entanglement "is a question of kind and degree." *Lynch*, 465 U.S. at 684. The Court has recognized that interaction between church and state is "inevitable" and therefore, entanglement must be "excessive" to conclude that the Establishment Clause is violated. *Agostini v. Felton*, 521 U.S. 203, 233 (1997). Ganulin argues that § 6103 creates excessive entanglement because ensuring that the legal public holiday and the accompanying vacation day for federal

employees furthers only secular purposes would require pervasive monitoring. He further argues that the government and religion become "inextricably intertwined" resulting in the "ultimate" excessive entanglement. Plaintiff Richard Ganulin's Memorandum in Opposition to the Government's Motion to Dismiss and the Intervenor's Motion to Dismiss, p. 40.

The Court finds Ganulin's arguments to be conclusory and inaccurate. Ganulin fails to give any concrete examples of the type of monitoring that is or would be required, nor can the Court think of any. The government's role is limited to declaring December 25th to be a legal public holiday. How federal employees and other citizens choose to observe the holiday is their own concern. The government has no right to or interest in monitoring its citizens to determine if they engage in religious celebrations on Christmas. Section 6103 does not require government participation in religious activities nor does it provide funding for religious activities. *See Koenick*, 973 F. Supp. at 527 (stating the same in regards to allowing public school holiday on the Friday before Easter). In an analogous situation, the Sixth Circuit found that government officials are not required to make religious determinations and there is no entanglement when government officials declare that courthouses and offices will be closed on the Good Friday, the Friday before Easter. *See Granzeier*, 173 F.3d at 574. The same conclusion applies to the declaration of Christmas as a legal public holiday.

4. Conclusion on the Establishment Clause

The Court holds that under Sixth Circuit and Supreme Court precedent the establishment of Christmas Day as a legal public holiday does not violate the Establishment Clause because it has a valid secular purpose, it does not have the effect of endorsing religion in general or Christianity in particular, and it does not impermissibly cause excessive entanglement between church and state.[4]

C. Freedom of Association

Ganulin also argues that 5 U.S.C. § 6103 is unconstitutional because it violates his right to freedom of association. The freedom of association is not enumerated in the Constitution, but arises as a necessary concomitant to the Bill of Right's protection of individual liberty. The Supreme Court has explained the protections afforded by the freedom of association as follows:

> Our decisions have referred to constitutionally protected "freedom of association" in

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[4] Defendant-Intervenors also sought the Court to uphold the constitutionality of § 6103 based upon the fabric of society test articulated in *Marsh*. In *Marsh*, the Supreme Court upheld the practice of opening legislative sessions with prayer: "In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become a part of the fabric of our society." 463 U.S. at 792. Due to the Court's analysis under the modified *Lemon* test and the fact that the Sixth Circuit has applied the *Marsh* precedent only in regards to other cases involving public prayer and public invocation, the Court declines to analyze § 6103 under *Marsh*.

> two distinct senses. In one line of decisions, the Court has concluded choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.

Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984) (holding that a state discrimination law which had the effect of requiring the Jaycees to admit women did not violate the freedom of association). The Supreme Court added that the freedom to associate "plainly presupposes a freedom not to associate." *Id.* at 623.

Ganulin argues that § 6103 impinges on his associational rights because "freedom of association includes the right to have the government not impose Christian religious or Christian cultural beliefs on him." Amended Complaint (doc. #18), ¶ 32. He argues that the government's celebration of Christmas as a legal public holiday classifies Christian religious and cultural beliefs in a preferred way that impinges on his fundamental rights to believe and associate as a non-Christian. He objects to having the holiday imposed upon him because he alleges that the Christian ideas that underlie the holiday are the

kind of ideas that underlie a person's identity and existence. He then argues that because § 6103 impinges upon his rights, the statute can only be upheld if it can survive strict scrutiny analysis. "Infringements on [the right to associate] may be justified by regulations adopted to serve compelling interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623. Ganulin concludes that the government has no compelling interest.

The error in Ganulin's argument is that his assertions do not state a claim under either type of associational protection described by the Court in *Roberts*. The first type of claim recognizes that the Bill of Rights "must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Id.* at 618. The Supreme Court gives as examples of protected relationships: marriage (*Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978)), childbirth (*Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-86 (1977)), and cohabitation with relatives (*Moore v. East Cleveland*, 431 U.S. 494, 503-04 (1997) (plurality opinion)). *See id.* The second type of protected associations correspond to the First Amendment and give a right to "associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Id.* at 622.

Ganulin does not, and cannot, allege that the government imposes upon him or his family participation with others in religious services and celebrations. His argument, rather, is that his free association rights are being violated by imposing Christian beliefs on him and his

family. In this same vein he argues that it is inconsistent for the government to assert that Christmas is a highly secularized holiday and for the Intervenors to state that they intend to attend religious services on Christmas day.

The Court does not agree with Ganulin's arguments. Ganulin and his family have the freedom to celebrate, or not celebrate, the religious and the secular aspects of the holiday as they see fit. The Court simply does not believe that declaring Christmas to be a legal public holiday impermissibly imposes Christian beliefs on non-adherents in a way that violates the right to freedom of association. Moreover, the Court finds no inconsistency in the Defendant's and Defendant-Intervenor's arguments. The Sixth Circuit has stated in reference to Christmas Day and Thanksgiving Day that "holidays are established for the convenience of its citizens, and that convenience often is caused by individual motivations that may be a mix of secular and religious." *Granzeier*, 173 F.3d at 575. The government can establish legal public holidays for secular reasons and its citizens can choose to celebrate the holidays in a religious manner without contradiction.

Therefore, the Court holds that Ganulin cannot establish as a matter of law that the enactment of Christmas Day as a legal public holiday violates his right to freedom of association.

D. Equal Protection

Ganulin's last claim is that the establishment of Christmas Day as a legal public holiday violates his right to equal protection under the law. Laws that neither burden a fundamental right nor target a suspect class are

upheld under equal protection analysis so long as they bear a rational relationship to some legitimate end. *See Romer v. Evans*, 517 U.S. 620, 631 (1996). Ganulin has asserted his status as a citizen and a taxpayer in his Amended Complaint. He is not a member of a suspect class to the extent that 5 U.S.C. § 6103 can be said to target him. Therefore, unless the Court finds that the law impinges on his fundamental rights of freedom of association or to free exercise of religion – a claim not asserted by Ganulin in his Amended Complaint or in his briefs – then § 6103 will be upheld if it bears a rational relationship to a legitimate end.

The Court has already held that Ganulin's fundamental right of freedom of association is not impinged by § 6103. Further, the Court has found legitimate secular purposes for establishing Christmas as a legal public holiday. To again quote the dissenting judges in a case upholding the inclusion of a creche in a public holiday display: "When government decides to recognize Christmas day as a public holiday, it does no more than accommodate the calendar of public activities to the plain fact that many Americans will expect on that day to spend time visiting with their families, attending religious services, and perhaps enjoying some respite from pre-holiday activities." *See Lynch*, 465 U.S. at 710 (Brennan, J. dissenting, joined by Marshall, Blackmun, and Stevens, JJ.); *see also County of Allegheny*, 492 U.S. at 611-12 ("[C]onfining the government's own celebration of Christmas to the holiday's secular aspects . . . simply permits the government to acknowledge the holiday without expressing an allegiance to Christian beliefs."); *Zorach*, 343 U.S. at 313-14 ("When the state . . . cooperates

with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.").

Accordingly, the Court holds the establishment of Christmas Day as a legal public holiday does not violate fundamental rights nor discriminate based upon suspect criterion. The United States, moreover, has a rational, secular reason for the establishment of the holiday. The Court, therefore, holds that Ganulin cannot establish as a matter of law that 5 U.S.C. § 6103 violates his rights to equal protection under the law.

IV. CONCLUSION

The Court finds as a matter of law that on the facts alleged Plaintiff Ganulin cannot support his claims that the establishment of Christmas Day as a legal public holiday violates the Establishment Clause or his rights to freedom of association and equal protection under the United States Constitution. Therefore, for the reasons explained above, the Defendant's Motion to Dismiss (doc. #21) and the Defendant-Intervenors' Motion to Dismiss (doc. #22) are hereby **GRANTED**.

IT IS SO ORDERED.

/s/ Susan J. Dlott
Susan J. Dlott
United States District Judge

Supreme Court
FILED
MAR 30 2001
OFFICE OF THE CLERK

(2)

No. 00-1355

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

RICHARD GANULIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS JEFFREY NIEMER, PATTY HEMSATH, AND ANNE DOLAN

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QUESTION PRESENTED

Whether the designation of Christmas as a federal holiday is so plainly consistent with the Establishment Clause of the First Amendment that this Court should affirm that designation by summary disposition on the merits. *See, e.g., Stone* v. *Graham*, 449 U.S. 39 (1980) (per curiam).

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IN THE

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RICHARD GANULIN,

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UNITED STATES OF AMERICA,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS JEFFREY NIEMER, PATTY HEMSATH, AND ANNE DOLAN

Respondents Jeffrey Niemer, Patty Hemsath, and Anne Dolan, federal employees and intervenors-appellees below, respectfully submit this brief in opposition to the Petition for Writ of Certiorari filed by Petitioner Richard Ganulin, plaintiff-appellant below.

REASONS FOR DENYING THE WRIT

I. PLENARY REVIEW IS UNNECESSARY.

The decision below is an unpublished affirmance of a district court decision upholding the designation of Christmas as a federal holiday. It neither conflicts with any decisions of this Court, nor creates or exacerbates any meaningful split of authority among the circuits, and the Petition for Writ of Certiorari contains no claim to the contrary. Under the Rules of this Court, plenary review is plainly unnecessary. *See* Rule 10.

II. SUMMARY DISPOSITION ON THE MERITS IS APPROPRIATE.

Instead, the Court should decide this case by summary disposition on the merits. *See* Rule 16.1; *see, e.g., Stone* v. *Graham*, 449 U.S. 39 (1980) (per curiam). The federal statute at issue in this case—which declares legal holidays on various days, including Christmas, and gives all federal employees the day off on those days—is unmistakably constitutional. Governments, always and everywhere, have marked in law culturally significant days and accommodated their voluntary celebration; culturally significant days, always and everywhere, include religious and nonreligious celebrations alike.

In *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), this Court emphasized that a government nativity scene could constitutionally be displayed so long as its context made clear that it was merely one cultural offering among many. Similarly, in *County of Allegheny* v. *American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), this Court stressed that a menorah could constitutionally be displayed because its particular context indicated that it was but one item in a larger display celebrating cultural diversity. Context, of course, may be temporal as well as spatial. And

the appropriate context for evaluating governmental celebration of cultural holidays—whether with displays or with declarations or proclamations—consists of the government's other cultural offerings throughout the year. *Cf. Capitol Square Rev. and Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) ("the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears.") (O'Connor, J., concurring). So long as that context demonstrates that the government is simply *acknowledging* or *accommodating* a popular holiday in the culture, the Establishment Clause is easily satisfied. This is true, moreover, whether the question is considered under the coercion analysis of *Lee* v. *Weisman*, 505 U.S. 577, 587 (1992), the endorsement analysis of *Santa Fe Indep. Sch. Dist.* v. *Doe*, 120 S. Ct. 2266, 2278, 282-83 (2000), or the tripartite test of *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971).

By granting summary disposition on the merits—and making this reasoning unmistakably clear, once and for all—the Court could provide needed clarity to its public holiday cases and direction to the lower courts.[1]

III. THE FEDERAL CHRISTMAS HOLIDAY IS PERMISSIBLE GOVERNMENT CULTURAL EXPRESSION.

The ubiquitous government practice of instituting legal holidays in recognition of cultural festivals, such as the Christmas holiday at issue here, is a manifestly constitutional form of government expression.

The Constitution generally affords state and federal

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[1]Summary disposition is also appropriate for Petitioner's Freedom of Association and Equal Protection claims. *See McGowan v. Maryland*, 366 U.S. 420, 429-30 (1961).

governments plenary control over their own speech, and makes them primarily accountable to the electorate, not the judiciary, for the positions they express. *See Board of Regents of Univ. of Wis. Sys.* v. *Southworth,* 120 S. Ct. 1346, 1357 (2000); *Rust* v. *Sullivan,* 500 U.S. 173, 192-95 (1991). Subject to the First Amendment's prohibition on government expression that tends to establish religion, and to other narrow exceptions, the government may speak as it chooses.

Among the many permissible subjects of government expression are the cultural aspects of religion. In fact, "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch* v. *Donnelly,* 465 U.S. 668, 674 (1984). Examples of these acknowledgements abound. *E.g., id.* at 675-678; *Marsh* v. *Chambers,* 463 U.S. 783, 792 (1983); *see also School Dist. of Abington Twp.* v. *Schempp,* 374 U.S. 203, 225 (1963) (noting that government schools may teach non-devotional courses on the Bible or religion, and that such courses are commendable).

Most notable for present purposes, the Court in *Lynch* emphasized in dicta that the government is permitted to declare national holidays on religious holidays, without redefining them as secular:

> Beginning in the early colonial period long before Independence, a day of Thanksgiving was celebrated as a religious holiday to give thanks for the bounties of Nature as gifts from God. President Washington and his successors proclaimed Thanksgiving, with all its religious overtones, a day of national celebration and Congress made it a National Holiday more than a century ago. That holiday has not lost its theme of expressing thanks for Divine aid any more than has Christmas lost its religious significance.

> Executive Orders and other official announcements of Presidents and of the Congress have proclaimed both Christmas and Thanksgiving National Holidays in religious terms. *And, by Acts of Congress, it has long been the practice that federal employees are released from duties on these National Holidays, while being paid from the same public revenues* that provide the compensation of the Chaplains of the Senate and the House and the military services. Thus, it is clear that Government has long recognized—indeed it has subsidized—holidays with religious significance.

Id. at 675-76 (footnotes, citations omitted, emphasis added). Moreover, although the Court was divided over the crèche at issue in *Lynch*, even the dissenting justices opined that "public designation of Christmas day as a holiday is constitutionally acceptable." *Id.* at 710 (Brennan, J., joined by Marshall, Blackmun and Stevens, JJ., dissenting).

In short, if government is to mark and make room for cultural celebrations generally—and one can scarcely conceive of a government that does not—some government holiday expressions will necessarily include religious elements.[2]

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[2]Nor could it be otherwise in a free society. This Court has recognized that the human quest for truth and transcendence is ubiquitous. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (recognizing "the religious nature of our people," and that "the spiritual needs of man" give rise to so "wide a variety of beliefs and creeds"); *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."). *See also* MIRCEA ELIADE, THE QUEST: HISTORY AND MEANING IN RELIGION 8-9, 68 (1969) (historian of religion describing human beings as "*homo religiosus*"); MAX SCHELER, MAN'S

Government expression may thus *acknowledge* or *reflect* the broader culture, including its religious elements, *Marsh*, 463 U.S. at 792 (permitting government religious expression as "acknowledgment of beliefs widely held among the people of this country"), so long as it does not establish religion. That is, government may freely recognize the role of religion in society, so long as it does not coerce compliance with religion, *Lee*, 505 U.S. at 587, proselytize for or "endorse" it, *Santa Fe*, 120 S. Ct. at 2278,[3] or otherwise become overly entangled with it, *Lemon*, 403 U.S. at 613-14.

PLACE IN NATURE 36-37 (H. Meyerhoff trans. 1961) (philosophical anthropologist identifying "openness to the world," or capacity for transcendence, as distinguishing characteristic of human beings). This religious impulse necessarily finds expression in the broader culture, including in the form of regularly recurring, wholly voluntary, cultural celebrations that signify the extraordinary meaning of certain occasions. *See, e.g., McGowan*, 366 U.S. at 450 (describing Sunday as a "day apart from all others"); *cf.* VICTOR W. TURNER, THE RITUAL PROCESS: STRUCTURE AND ANTI-STRUCTURE 96-97 (1969) (cultural anthropologist discussing phenomenon of *communitas*, or collective departure from normal course of life to express special meaning and preserve social order).

[3]These two risks appear most likely to materialize where the religious expressions occur in the context of a primary or secondary public school. *See, e.g., Santa Fe Indep. Sch. Dist.* v. *Doe*, 120 S. Ct. 2266 (2000); *Lee* v. *Weisman*, 505 U.S. 577 (1992); *Edwards* v. *Aguillard*, 482 U.S. 578 (1987); *Wallace* v. *Jaffree*, 472 U.S. 38 (1985); *Stone* v. *Graham*, 449 U.S. 39 (1980); *School Dist. of Abington Tp.* v. *Schempp*, 374 U.S. 203 (1963); *Engel* v. *Vitale*, 370 U.S. 421 (1962).

A. The federal Christmas holiday involves no religious coercion by the government.

This Court long ago put to rest the notion that government closure on religious holidays was somehow coercive. In *Zorach v. Clauson*, 343 U.S. 306 (1952), the Court emphasized that the government

> *may not coerce* anyone to attend church, to observe a religious holiday, or to take religious instruction. *But it can close its doors or suspend its operations* as to those who want to repair to their religious sanctuary for worship or instruction.

Id. at 314 (emphasis added).

B. The federal Christmas holiday involves no religious proselytizing or endorsement by the government.

In assessing whether government has impermissibly proselytized for or endorsed religion, the Court views the government expression from the perspective of a reasonable observer who is acquainted with the full context of the expression, including any statutory text, history, and implementation. *See Santa Fe Indep. Sch. Dist.* v. *Doe*, 120 S. Ct. 2266, 2278, 2283 (2000); *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring).

1. The historical context of the federal Christmas holiday demonstrates that the holiday is permissible.

Here, the reasonable observer would know that there is a lengthy, "unbroken history," *Lynch*, 465 U.S. at 674, of

recognizing Christmas as a state and federal holiday. Congress began legislating Christmas as a public holiday for the District of Columbia in 1870, providing:

> That the following days, to wit: The first day in January, commonly called New Year's day, the fourth day of July, the twenty-fifth day of December, commonly called Christmas day, and any day appointed or recommended by the President of the United States as a day of public fast or thanksgiving, shall be holidays within the District of Columbia, and shall, for all purposes of presenting for payment or acceptance for the maturity and protest, and giving notice of the dishonor of bills of exchange, bank checks and promissory notes or other negotiable or commercial paper, be treated and considered as is the first day of the week, commonly called Sunday, and all notes, drafts, checks, or other commercial or negotiable paper falling due or maturing on either of said holidays shall be deemed as having matured on the day previous.

Act of June 28, 1870, ch. 167, 16 Stat. 168.

In an 1885 joint resolution respecting holiday payment for federal workers, Congress allowed "the employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States . . . the following holidays, to wit: . . . the twenty-fifth day of December, . . . and shall receive the same pay as on other days." J. Res. of Jan. 6, 1885, No. 5, 23 Stat. 516.

In 1894, the fifty-third Congress began the process, which continues with the statute at issue here, of enumerating the public holidays:

> That the first Monday of September in each year, being the day celebrated and known as Labor's Holiday, is hereby made a legal public holiday, to all intents and purposes, in the same manner as Christmas, the first day of January, the twenty-second day of February, the thirtieth day of May, and the fourth day of July are now made by law public holidays.

Act of June 28, 1894, ch. 118, 28 Stat. 96.[4]

The individual States have recognized the legal status of Christmas even longer. All States recognize Christmas as a holiday. The first was Alabama in 1836, followed soon by Louisiana and Arkansas in 1838. Ohio recognized the holiday in 1857. *See generally* BARNETT, THE AMERICAN CHRISTMAS 20 (1954) (listing dates of first legal recognition of Christmas Day by States and Territories). For more than a century and a half, these provisions have allowed such accommodations as the closing of state government offices, banks, and schools.

Christmas has been legally recognized in myriad other ways. Alabama did not require convicts to work on Christmas Day. Alabama Acts 1894-95, p. 858, § 40 (cited in *Sloss Iron & Steel Co. v. Harvey*, 22 So. 994, 994 (1898)). Many states specifically forbade the sale of liquor on Christmas, *see, e.g., People v. Thielman*, 72 N.W. 1102, 1102 (Mich. 1897), and courts have long been closed. *See, e.g., Tice v. Frazier*, 49 P. 1038 (Ore. 1897) (interpreting an 1862 statute which read "The courts of justice may be held, and judicial business may be transacted, on any day, except as provided in this section. No

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[4]The federal Bankruptcy Act similarly "exclude[d] . . . Christmas Day, . . . from the computation of time within which any act shall be done under that law." Act of 1867, § 48, 14 Stat. 540; *In re McGlynn*, 16 F. Cas. 122 (D. Mass. 1872); *In re Lang*, 14 F. Cas. 1097 (D. Mass. 1869).

court can be opened, nor can any judicial business be transacted on . . . Christmas Day," GEN. LAWS OR. 1843-1872, ch. 11, tit. 7, § 899); *In re Worthington*, 30 F. Cas. 641 (W.D. Wisc. 1877) ("the 25th day of December and the 1st day of January are declared to be holidays"). In short, the reasonable observer would know of the "history and ubiquity," *Allegheny,* 492 U.S. at 630-31 (O'Connor, J., concurring), of government recognition of Christmas.

2. The contemporaneous context of the federal Christmas holiday demonstrates that the holiday is permissible.

Just as importantly, a reasonable observer would know that Christmas is only one in a broad and diverse array of government holidays, religious and nonreligious alike. In particular, such an observer would know that the statute instituting the federal Christmas holiday, 5 U.S.C. § 6103, marks not only that Christian holiday, but the more generically religious Thanksgiving holiday, secular holidays with some religious overtones (Memorial Day and Veterans Day), secular holidays with ethnic overtones (Martin Luther King, Jr.'s Birthday and Columbus Day), secular holidays with patriotic overtones (George Washington's Birthday and Independence Day), a secular holiday with primarily economic significance (Labor Day), and a secular holiday that simply marks the new calendar year (New Year's Day). *See* 5 U.S.C. § 6103. Like the diverse elements in the visual displays approved in *Lynch* and *Allegheny,* the varied cultural celebrations here provide the context necessary to dispel any notion of government proselytizing or endorsement. *See Lynch* v. *Donnelly,* 465 U.S. 668 (1984); *County of Allegheny* v. *American Civil Liberties Union Greater Pittsburgh Chapter,* 492 U.S. 573 (1989).

Seen in this context, government acknowledgement of holidays with special significance to some religious groups is

thus no more problematic than its recognition of holidays with special significance to certain ethnic groups. The Establishment Clause's prohibition on religious preferences is coextensive with that against racial and ethnic preferences found in the Fifth and Fourteenth Amendments. *Compare Larson* v. *Valente,* 456 U.S. 228, 246 (1982) (applying strict scrutiny to sect preferences), *with Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (applying strict scrutiny to racial preferences), *and Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (applying strict scrutiny to racial or ethnic preferences) (plurality opinion of Powell, J.).

The government may no more prefer Irish-Americans to English-Americans than it may prefer Christians to Buddhists. Nevertheless, no one seriously argues that government celebrations of St. Patrick's Day are a constitutional affront to Anglophiles. Nor do we entertain lawsuits by European-Americans seeking to enjoin African-American History Month. The reason is plain: in the context of the vast cultural offerings of our federal, state, and local governments, no one could reasonably suppose that any one holiday honoring any particular ethnicity is a government declaration of ethnic preference. For precisely the same reason, government recognition of particular religious celebration—whether it be Ramadan or a Hindu New Year in Jersey City, New Jersey, *see, e.g., ACLU* v. *Schundler,* 168 F.3d 192 (3d Cir. 1999), the federal recognition of Christmas at issue here, or the government's erecting a menorah on the Ellipse for Hannukah—are not declarations of religious preference. Rather, they, like a government's various ethnic offerings, are simply small pieces in a larger mosaic of cultural diversity.

C. The federal Christmas holiday satisfies the three-part *Lemon* test.

Application of the criteria set out in *Lemon* v. *Kurtzman,*

403 U.S. 602 (1971), leads to the same conclusion. The Christmas holiday: (1) has a secular legislative purpose; (2) has a principal or primary effect that neither advances nor inhibits religion; (3) does not foster excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13.

Granting holidays of societal significance is itself, and without more, a valid secular purpose. *See McGowan* v. *Maryland*, 366 U.S. 420, 449-51 (1961). However, since the Christmas holiday may also be viewed as an accommodation of religion, it is well-established that reducing governmental interference with voluntary religious exercise—here of federal employees—is a secular purpose. *See Presiding Bishop of the Church of Jesus Christ of Latter Day Saints* v. *Amos*, 483 U.S. 327, 335 (1987).

Second, giving federal employees the day off—even with knowledge that some will use that free time for religious worship—does not have the effect of positively advancing religion within the meaning of the Establishment Clause. *See Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617, 628-29 (1961) (noting that Sunday closing laws are valid "even if the day [of rest] thus selected is chosen because a great majority of the people celebrate it as a day of peculiar sanctity") (internal quotations omitted). Instead, the government's accommodation simply acknowledges the existence of this religious exercise and avoids stifling it. *Zorach*, 343 U.S. at 314 ("When the state . . . cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.")

Finally, legal holidays involve no governmental surveillance of or intrusion into religious affairs that typically supports a finding of "excessive entanglement." *See Walz* v.

Commissioner, 397 U.S. 664, 675 (1970). *But cf. Agostini* v. *Felton,* 521 U.S. 203, 232-33 (1997) (treating "excessive entanglement" inquiry as part of "effects" inquiry). Indeed, the government's providing a day off avoids interference with religious exercise, and so inherently *disentangles* government and religion. *See Amos,* 483 U.S. at 340.

Thus, providing a legal holiday for Christmas is fully constitutional, no matter which Establishment Clause standard is applied. Instead, the holiday falls within government's broad authority to express acknowledgement of, and to accommodate, voluntary religious exercise. All levels of American government are—and have been for a very long time—in the business of celebrating and accommodating culturally significant days, religious and nonreligious alike. This case represents a perfect illustration of why that practice is plainly constitutional.

CONCLUSION

For the foregoing reasons, the Court should deny the plenary review that Petitioner requests, and instead affirm the decision below by summary disposition on the merits. *See* Rule 16.1; *see, e.g., Stone* v. *Graham*, 449 U.S. 39 (1980) (per curiam).

Respectfully submitted,

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March 2001